SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 365

M. A. HOLAHAN, Trustee, ET AL.,
Petitioner,

versus

J. HARRY HENDERSON, ET AL.,
Respondents.

On Petition for Writ of Certiorari to The United States Court of Appeals for The Fifth Circuit

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT, PERRY H. COLEMAN

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Perry H. Coleman, one of the respondents herein, received notice on August 7, 1968 that petitioner had applied to this Honorable Court for a writ of certiorari. This respondent respectfully opposes the granting of such writ for the following reasons:

1) The legal principles alleged to be involved are well settled and were correctly applied below.

2) The liability of this respondent in the two cases involving him (designated Civil Actions 11,488 and 11,-490 in the district court), turned purely and simply upon findings of fact.

3) The factual determinations made below were supported by a heavy preponderance of the evidence.

4) No special or important reasons ordinarily considered as governing review by this Honorable Court on certiorari exist in the instant case.

ARGUMENT

MAY IT PLEASE THE COURT:

Petitioner's recitation of the facts pertaining to Civil Action Number 11,488, involving the destruction by fire of $103,000 in currency in mid-1963, have been grossly slanted and mis-stated by petitioner. Respondent will not burden this brief with factual rebuttal. Sufficient to say that the mass of evidence was painstakingly reviewed in agonizingly minute detail by counsel before the district court; the district court itself reviewed the salient points in its opinion. The district court expressly stated that it had tested the evidence in light of the statutes whose applicability petitioner urges. The district court nevertheless found the evidence to favor respondents.

Again, in arguments to the court of appeals, all of the evidence was reviewed in minute detail. That court,

in a per curiam memorandum, "readily" agreed with the findings of the district court.

In the face of the consistent and well supported evidence by which respondents countered each of petitioner's utterly unfounded and reckless accusations, petitioner's position amounted to nothing more — as the district court put it — than "merely . . . plaintiffs' repeated assertion that the tale is too incredible on its face to be believed". That court correctly concluded that, "This naked assertion is not enough to tip the scales against defendants (277 F.Supp. 890, 894).

Petitioner begs the question by arguing that the statutory test was not applied to the evidence. The district court said it did apply this test and nonetheless found for respondents; the court of appeals "readily" agreed.

A grant of certiorari in this case could lead to nothing more than a review of the evidence and the inferences thereof in a disputed factual controversy, which is not the function of the writ. Petitioner does not and cannot allege that any constitutional issues are involved in these cases; where no questions of constitutional due process are involved, this Honorable Court will not reexamine findings of fact which are supported by substantial evidence. Specifically, a lower court finding of "good faith" under the bankruptcy laws (which is what is involved in the instant cases) is considered a conclusive finding of fact, not reviewable on certiorari. *Comstock v. Institutional Investors,* 335 U.S. 211, 68

S.Ct. 1454, 92 L.Ed. 1911, and numerous cases cited therein.

Petitioner's treatment of the facts in Civil Action Number 11,490 is equally faulty. This case involved the payment of respondent Coleman's salary and reimbursement of out-of-pocket expenses. Petitioner pretermits the question of whether respondent had earned and was entitled to this money, probably because the district judge, after reviewing the evidence, specifically found that the payment was amply supported by consideration, was made in good faith and was not part of a scheme to hinder, delay or defraud creditors. However, petitioner urges that respondent Coleman used the money for the use and benefit of respondent Henderson, owner of the bankrupt corporation. This is absolutely untrue. Petitioner tried mightily to prove this, but utterly failed to do so. Petitioner can point to no evidence anywhere in the record to support this preposterous assertion; the district court found the assertion to be without foundation.

No violence has been done to the principles enunciated by this Honorable Court in *Pepper v. Litton,* 308 U.S. 245, 60 S.Ct. 238, and other cases cited by petitioner. No right-thinking person could quarrel with the holdings of such cases, which holdings were cited to and extensively argued before both lower courts. The fact remains, however, that no showing was made in these cases of any misconduct or violation of such principles on the part of respondent. The whole scheme in *Pepper v. Litton* was so patently fraudulent and contrived as to bear no resemblance to the instant case,

where a corporate employer paid an agreed-upon and board-of-directors-authorized salary to its employee (respondent Coleman) who had clearly earned it.

In stating his reasons why this Honorable Court should grant a writ of certiorari, petitioner assumes as proven in his favor three crucial points:

1) that "various schemes of the insiders" were involved;

2) that "moral or legal improprieties" were involved;

3) that "good faith" was lacking in the payment of respondent Coleman's salary.

In truth, the lower courts held against petitioner on each of these basic points as matters of fact. The efficacy of petitioner's reasons is therefore seriously in question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT B. NEBLETT, JR.

Of Counsel:

LEONARD FUHRER

CERTIFICATE

STATE OF LOUISIANA
PARISH OF RAPIDES

ROBERT B. NEBLETT, JR., being duly sworn, deposes and says:

That he is a duly qualified member of the Bar of the Supreme Court of the United States; that he has forwarded copies of the foregoing brief in opposition to the petition for certiorari to Mr. J. Harry Henderson, Mrs. Constance Henderson, Miss Rosalie Henderson and M. A. Holahan by depositing a copy thereof, postage prepaid, to their counsel of record at their last known addresses in Alexandria and New Orleans, Louisiana, on this 26th day of August, 1968.

Robert B. Neblett Jr.
ROBERT B. NEBLETT, JR.

SWORN TO AND SUBSCRIBED BEFORE ME, Notary, this 26th day of August, 1968.

Cheryle M. Verzwyvelt
Notary Public